No. 79-395

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, *Petitioner,*

v.

HAZEL MORRISON, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

SHELDON PORTMAN
Public Defender

COUNTY OF SANTA CLARA
70 West Hedding Street
First Floor, West Wing
San Jose, California 95110
(408) 998-5121

Counsel for Amicus Curiae

NATIONAL LEGAL AID AND DEFENDER ASSOCIATION
1625 K Street, N.W.
8th Floor
Washington, D.C. 20006
(202) 452-0620

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BRIEF OF NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

This brief is filed pursuant to Rule 36 of the Supreme Court rules. Consent to file has been granted by the Solicitor General of the United States, Counsel for the Petitioner, and by Salvatore J. Cucinotta, Esq., counsel for the Respondent. Letters of consent of both parties have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

National Legal Aid and Defender Association (NLADA) is a not-for-profit organization whose primary purpose is to assist in providing effective legal services to the poor. Its members include the great majority of defender offices, coordinated assigned counsel systems and legal aid societies in the United States. The member-

ship of NLADA also includes two thousand individual members, most of whom are private practitioners.

In its endeavor to assure effective legal services to the poor, NLADA also defends against governmental attempts to infringe upon constitutional guarantees, particularly those affecting due process and effective assistance of counsel which are in issue in this case. Too frequently, such incursions affect the rights of the poor and minorities who are least able to defend against them.

This case involves principles which are vital to the defense of indigent persons against unwarranted deprivation of constitutional rights by governmental agents. In defense of what we believe is a threat to the very integrity of the judicial process as well as the constitutional rights of accused persons, we offer the within argument.

ARGUMENT

I. The Government's Assertion That Respondent Suffered "No Prejudice" Is Unfounded.

The "Question Presented," as set forth in the government's petition for certiorari and repeated in its brief, assumes a fact not supported by the record, i.e., that ". . . the law enforcement officers' misconduct . . . did not injure respondent in any way." (Petition for Certiorari, p. 2) The Third Circuit did not attempt to assess the prejudice to the respondent, but it focused on the "wrongfully motivated or inadequately justified" nature of the interference with respondent's Sixth Amendment right to counsel. This did not imply, as petitioner seems to suggest, that the Court of Appeals concluded that there was little or no prejudice to the respondent. On the contrary, in referring to its earlier decision

in *United States* v. *Levy*, 577 F.2d 200 (3d Cir. 1978), involving a DEA informer's attendance at a meeting with counsel and disclosure of information, the Court of Appeals indicated that the determination of prejudice was, as in this case, "speculative at best." (*United States* v. *Morrison*, 602 F.2d 529, 533 (1979).)

The petitioner seems to assume from that conclusion that respondent was not injured or not prejudiced "in any way." That assumption, which apparently prompted this Court to grant certiorari and which is the main premise of petitioner's argument, is simply not supported by the record. On the contrary, there is a clear inference, not dispelled by the government, that respondent's heavy, five-year prison sentence may have been the result of vindictive conduct by the DEA agents in retaliation for her refusal to plea bargain without the assistance of her counsel.

The record shows that the DEA agents explicitly threatened that, if the respondent did not agree to "cooperate" as they directed --

> They "could recommend . . . [and] she that *would* get a stiff jail sentence." (A. 110a; emphasis added);
>
> They "would be against [her] one hundred percent." (A. 142a-143a);
>
> She would be sentenced by "the worst S.O.B. in the federal courtroom" who "hate[s] black people." (A. 128a, 144a);
>
> Her attorney "could not present anything to the U.S. Attorney." (A. 143a); and
>
> Her "goddam ass [was] going to jail." (A. 144a).

After she refused to plea bargain without the aid of counsel, respondent did indeed receive "a stiff jail sentence" following her guilty plea to one count of the

two-count indictment. While the record does not indicate that the agents did in fact make good on their threats, neither does it show they did *not* do so nor that her heavy sentence was not the result of vindictive prosecutorial misconduct. It is the government's burden to dispel the appearance of such vindictiveness. (*Cf.*, *Blackledge* v. *Perry*, 417 U.S. 21 (1974).) Having failed to do so, it should not be permitted to argue that respondent was not prejudiced.

It is not unlikely that the agents carried out their threats since adverse "confidential" sentencing information is typically communicated to district court judges by law enforcement officers under Federal Rule of Criminal Procedure 32(c). A recent study of the administration of the "disclosure" requirements of Rule 32(c) indicates substantial abuses by law enforcement agents, including " . . . several instances in which law enforcement agents attempted to 'burn' individuals with unreliable information." (Fennell & Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts,* 93 Har.L.Rev. 1615, 1658 (1980).)

Further abuses were revealed in a survey of line probation officers who reported that "law enforcement investigative information is most likely to be held confidential, accounting for 33 percent of all information kept confidential," and that

> " . . . [c]onfidential law enforcement information often contains unsubstantiated labels of the defendant -- such as 'major drug supplier' or 'organized crime member' -- or general descriptions of his degree of involvement in illegal activities. Not only are such allegations typically communicated to the court without a sufficient factual basis upon which to judge their reliability, but they are also centrally

> relevant to the sentencing court's determination of the defendant's conduct. This problem is exacerbated by the fact that the sources for this and other information are often law emforcement officials, such as the investigating case agent, who typically are not the original sources of the information and who cannot be completely relied upon for neutral judgment.
>
> "These dangers are compounded by the fact that probation officers usually do not independently verify law enforcement allegations." (*Id.*, at 1656-7; fns. omitted.)

Under these circumstances, the government is in no position to assert that respondent was "not prejudiced" "in any way." Whether or not the agents carried out their threatened retaliatory conduct, such as by the methods reported in the above study, is entirely within the knowledge of the agents and within the constructive knowledge of the petitioner. The government's failure to dispel the clear "appearance" of vindictiveness requires the conclusion that such conduct did in fact occur as in analogous cases of vindictive prosecution. (*Blackledge* v. *Perry, supra*, 417 U.S. 21 (1974).)

In any event, given this state of the record, there is no factual or legal basis whatsoever for the petitioner's assertion that the respondent was not injured or prejudiced "in any way."

II. The Government's Misconduct Deprived Respondent Of Her Sixth Amendment Right To Effective Assistance Of Counsel.

Petitioner not only asserts that respondent was not prejudiced by the egregious misconduct of the DEA agents, but it even denies that a violation of her right to effective assistance of counsel occurred. Under Point I

of its brief, petitioner suggests the novel position that no matter how egregious, the government's misconduct would not violate a defendant's right to effective assistance of counsel unless incriminating evidence were produced thereby and had a "practical effect" on a defendant's "trial and conviction."

Finding no authority to support this conclusion directly, petitioner attempted to distill it from a variety of decisions in which interference with the right to counsel affected trial proceedings or the guilt-determination phase. None of these cases, however, involved the deprivation of counsel at plea bargaining or sentencing, such as occurred here.

Petitioner's analysis suffers from a view of the right to counsel that is much too narrow. That important right, which is essential to the exercise of all other rights, obviously encompasses more than assistance in the guilt-determination or the "trial and conviction" process. Petitioner's argument ignores the equally (and often more) important functions of counsel at plea bargaining and sentencing.

Mr. Justice Rehnquist stressed these important functions in *Tollett* v. *Henderson*, 411 U.S. 258, 268 (1973), when he remarked that --

> "Counsel's concern is the faithful representation of the interest of his client, and such representation frequently involves highly practical considerations as well as specialized knowledge of the law. . . . *A prospect of plea bargaining, the expectation or hope of a lesser sentence*, or the convincing nature of the evidence . . . are considerations. . . ." (Emphasis added.)

The late Mr. Justice Douglas also alluded to these functions in the majority opinion in *Argersinger* v.

Hamlin, 407 U.S. 25, 34 (1972), when he wrote, "Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution."

This Court has also ruled that the Sixth and Fourteenth Amendments require the assistance of counsel at sentencing. (*Mempa* v. *Rhay*, 389 U.S. 128 (1967).) In this connection, the American Bar Association *Standards on Sentencing Alternatives and Procedures* (Approved Draft 1968) p. 245, points out that assistance of counsel at sentencing may constitute "the most important service of the entire proceedings."

The federal courts of appeals have also ruled that the constitutional right to effective assistance of counsel applies to plea bargaining, and they have reversed convictions for defaults of counsel which deprived defendants of the right to effective representation at that stage. (See, *Mascon* v. *Balcom*, 531 F.2d 717 (5 Cir. 1976); *Correale* v. *United States*, 479 F.2d 944 (1 Cir. 1973); *Cooks* v. *United States*, 461 F.2d 530 (5 Cir. 1972); *Gallarelli* v. *United States*, 441 F.2d 1402 (3 Cir. 1971).)

It is this aspect of the Sixth Amendment right to counsel that was implicated by the misconduct of the agents in this case -- *not* the functions of counsel in the "trial" process. Petitioner's reliance upon decisions involving violations of the latter functions is therefore misplaced.

Not only has petitioner misconceived the legal basis for the Sixth Amendment violation herein, but it has also mistaken the factual basis for the violation. Contrary to petitioner's assertion, the violation of the respondent's right to counsel does not arise from the fact

that the agents merely "questioned her in the absence of her attorney and tried to persuade her to change counsel to facilitate her cooperation. . . ." (Petitioner's brief at 14.) The true operative facts, as shown by the record, are that the agents engaged in plea bargaining and when respondent asked to have her attorney present they openly threatened that she would be punished for not cooperating.

Initially, they promised her leniency, including dismissal of her charges or probation in exchange for her cooperation in apprehending another violator. But if she did *not* "cooperate," they "could recommend . . . [and] she would get a stiff jail sentence." (A 110a.) When she persisted in asking that her attorney be present, the agents became "angry" and "perturbed," threatened that they would be "against [her] one hundred percent," and that she was "going to jail." (A. 112, 117a-118a, 142a-143a.)

The promise of leniency in exchange for respondent's assistance as an informer constituted plea bargaining in its traditional sense.[1] It also constituted a critical

---

[1] A defendant's assistance to law enforcement officers by "cooperation . . . in the apprehension or conviction of others is a proper basis for the exercise of prosecutorial discretion to decline to prosecute, notwithstanding that evidence exists which would support a conviction." (ABA, *Standards on the Prosecution Function* (Approved Draft, 1971) Std. 3.9(b) (vii).) As the commentary to the above ABA Standard points out:

> "Prosecutors frequently and properly choose a lenient course with one participant in criminal activity in order to bring other more serious offenders to justice. See Baker, *The Prosecutor -- Initiation of Prosecution*, 23 J. Crim. L.C. & P.S. 770, 788-90 (1933). The under-lying policy is represented in statutes found in many jurisdictions, permitting the grant of immunity from prosecution in exchange for testimony. See, e.g., *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964)." (*Id.*, at 95-96.) (See also, ABA *Standards on Pleas of Guilty* (Approved Draft, 1968), sec. 1.8(a) (b).)

stage of the proceedings for which respondent was entitled to the aid of counsel so that she would "know precisely what [s]he [was] doing, so that [s]he [was] fully aware of the prospect of going to jail or prison, and so that [s]he [was] treated fairly by the prosecution." (*Argersinger* v. *Hamlin, supra*, 407 U.S. at 34 (1972).)

Another complicating factor that further necessitated the aid and advice of counsel was the threat of serious physical danger to Mrs. Morrison and her small children if she agreed to cooperate and became an informant. This danger was referred to by DEA Agent Hopson in connection with the "Marshal Protection Program." He explained to the respondent that this would be available if the agents "felt that her life [would] be in danger or that of her children because of her testimony against a major heroin trafficker." (A. 42a.)

But despite these complexities, the agents insisted that Mrs. Morrison give up her right to the aid of counsel in conferring with them and negotiating the plea bargain or suffer the consequences of their "be[ing] against her one hundred percent" and receiving "a stiff jail sentence." The effect of this was to subject Mrs. Morrison to a cruel trilemma that consisted of the following elements:

1) Cooperate and trust that the agents would deliver a dismissal or probation, but expose her life and the lives of her children to physical danger; or

2) Not cooperate and avoid the danger to herself and her children, but have the agents "against her one hundred percent" and risk "a stiff jail sentence"; and

3) Give up her right to the advice and assistance of counsel in a "critical stage" of the proceedings, to obtain the promised leniency, or

> claim the right and be deemed uncooperative and suffer the threatened consequences.

The agents' refusal to allow respondent to exercise her constitutional right to the aid of counsel in making this critical decision is indisputable. It extended beyond mere personal antipathy toward her retained counsel, Mr. Cucinotta. They insisted that she had to agree first to cooperate, no matter who her counsel might be. As Agent Hopson stated, she was told that "*if she was going to cooperate* with the DEA, it may be advisable for her to obtain a public defender . . ." (A. 104a; emphasis added.)

The agents' insistence that Mrs. Morrison waive her right to counsel or suffer retaliatory punishment was made crystal clear when, by their own admission, they became "perturbed" and "angered" by her refusal to negotiate without her attorney present. (A. 112a, 117a-118a.) In the course of this angry reaction, they told her (according to Mrs. Morrison and undisputed by the government):

> " '. . . We don't need your attorney because your attorney can't do anything *until you decide to agree with us*, and . . . the only way that the U.S. Attorney is going to hear anything that you have to say, you have to make an agreement to cooperate with us.' " (A. 142a; emphasis added.)

When Mrs. Morrison replied that she was still unwilling to enter into the negotiations without her attorney, Agent Hopson angrily retorted:

> ". . . 'We are just wasting our time to keep coming backwards and forth out here if you are not going to cooperate.' . . . 'I am telling you, if you cooperate with me one hundred percent . . . I will be with you one hundred percent, . . . but if you don't cooperate with me, I will be against you one hundred percent . . .' " (A. 143a).

Agent Hopson's parting threat was that her . . . 'goddam ass [was] going to jail' " (A. 144a) — a consequence that she faces if this Court now decides to reverse the Third Circuit.

In the light of these facts, petitioner's contention that respondent suffered no violation of her constitutional right to effective assistance of counsel, let alone prejudice, is utterly frivolous.

III. The Government's Misconduct Was Intertwined With The Indictment And Polluted The Judicial Process, Necessitating A Complete Dismissal.

In contending that complete dismissal is an inappropriate remedy, petitioner repeats the same unfounded assumption that there was no prejudice to respondent. As indicated above, this contention simply finds no support in the record. With respect to petitioner's reliance on cases involving lesser remedies for evidentiary violations, these are simply not relevant to deprivations of the right to counsel in plea bargaining and sentencing such as occurred here.

This case falls within that class of cases which the petitioner's brief itself describes as,

> "[An] extreme case, where the taint [of government misconduct with respect to the attorney-client relationship] cannot be purged by a new trial . . . to remedy a Sixth Amendment violation. See, *e.g.*, *United States* v. *Levy*, 557 F.2d 200 (3 Cir. 1978); *United States* v. *Peters*, 468 F.Supp. 364 (S.D.Fla. 1979)." (Petitioner's brief at 29.)

It is the kind of case which this Court referred to when it stated:

> "We may some day be presented with a situation in which the conduct of law enforcement agents is so

> outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." (*United States* v. *Russell*, 411 U.S. 423, 431-2 (1973) (maj. op., Rehnquist, J.).)

It also involves what was described in *United States* v. *McCord*, 509 F.2d 334, 349-350 (D.C.Cir. 1974) (en banc), cert. denied, 421 U.S. 930 (1975), as:

> ". . . [S]erious prosecutorial misconduct [that] may so pollute a criminal prosecution as to require dismissal of the indictment or a new trial without regard to prejudice to the accused. . . . [¶] This is so because the principle is not one of fairness to the defendant alone but rather, in Justice Brandeis' words, is one designed to 'maintain respect for law; . . . to promote confidence in the administration of justice; . . . to preserve the judicial process from contamination . . .' "

This case also involves the kind of misconduct and contamination of the judicial process that prompted dismissals by the state courts in *People* v. *Moore*, 57 Cal.App.3d 437, 129 Cal.Rptr. 279 (1976); *Commonwealth* v. *Manning*, 373 Mass. 438, 367 N.E.2d 635 (1977); and *People* v. *Mason*, 97 Misc.2d 706, 411 N.Y.S.2d 970 (1978).

In discussing the latter cases, petitioner appears to concede that the remedy of complete dismissal *was* appropriate in *Mason* and *Moore* because the defendants were "obviously prejudiced" and their "injuries" could not be redressed short of a dismissal. (Petitioner's brief at 41.) However, petitioner contends that *Manning* — "involving a factual situation that resembles the one presented here" — was "wrongly decided" because — "the criminal proceedings against [the defendant], like those against respondent, were not prejudiced in any

way by the wrongful actions of law enforcement officers. . . ." (Petitioner's brief at 41-42.)

We disagree with the assertion that the "factual situation" in *Manning* "resembles" the present case. Unlike *Manning*, the respondent in this case received a very severe prison sentence after being specifically threatened earlier by the agents that if she didn't cooperate and forgo her right to counsel she "would" receive "a stiff jail sentence" and they "would be one hundred percent against her." The only "resemblance" this case has to *Manning* is that it involved a defendant who refused to succumb to threats and disparagement and insisted upon exercising her right to counsel. Such refusal, however, does not mean, as petitioner suggests, that respondent was "not prejudiced."

While the argument of "no prejudice" may be appropriate in *Manning*, where the defendant merely drew a suspended sentence after a trial and conviction, that argument has no foundation in this case, wherein respondent received a heavy five-year prison sentence for an unaggravated offense, following the agents' threats. As previously noted, the government has made no effort to dispel the appearance of vindictiveness with respect to her sentence, and therefore, it is hardly in a position to assert that she was not prejudiced in any way.

But more important and critical to the proper disposition of this and similar cases than the question of prejudice to the individual defendants involved is the matter of prejudice to the judicial process if the courts are permitted to be used in this fashion as "unwitting instrumentalities" for threatening and cajoling defendants to give up their constitutional rights.

Petitioner's argument suggests that relief should be limited to cases of defendants who have been "obviously prejudiced." This suggests that such unlawful conduct in cases of less than "obvious" prejudice would be ignored. These would include cases of "covert" prejudice (such as may have occurred in this case), and cases where judicial relief was not sought because of ignorance, through lack of counsel, or because of fear, through intimidation.[2]

Petitioner's argument, to the effect that relief should be limited to cases of "obvious prejudice" would serve to condone the misuse of the courts as "unwitting instrumentalities" by threats such as were made in this case, i.e., that respondent would be given "a stiff jail sentence" by "the worst S.O.B. in the federal courtroom" who "hate[s] black people." Such unscrupulous, overzealous agents would be unrestrained except in cases of "obvious prejudice." In such cases, defendants like the respondent would continue to be subjected to the "cruel trilemma" of waiving counsel, offending the officers, and exposing self and family to danger and death.

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[2] An example of such intimidation is found in the facts of a recent Ninth Circuit decision in an appeal from denial of a writ of habeas corpus under 28 U.S.C. sec. 2254. (*Mitchell* v. *Superior Court* _____ F.2d _____ (West's Cal. Adv. Serv., p. 326), (9 Cir., No. 79-2502, 10/7/80). The Ninth Circuit panel denied the appeal on jurisdictional grounds, which is now being reconsidered on a petition for rehearing. But the factual allegations set forth in the opinion indicate that after the defendants' public defender was rebuffed by the state officers in seeking information concerning promised leniency for her clients, she objected to their "working" for the officers, and they retaliated by arranging for the revocation of the defendants' pretrial releases, causing one of them to be incarcerated and leading to his serious injury when attacked in the jail for his work as an informant. (See West's Cal. Adv. Serv., p. 328.)

Petitioner's alternative suggestion of limiting relief in such cases to those involving prejudice to the "trial and conviction" process is even more specious. Invariably, such cases involve defendants who are factually guilty of an offense. This provides the officers with the plea bargaining "leverage" needed to enlist the defendant's "cooperation." Conditioning judicial relief in such cases on the basis of prejudice in the "trial and conviction" process would, in effect, be to deny any relief since factual guilt is not an issue in such cases.

The true "prejudice" that defendants such as respondent suffer in these cases when deprived of the aid of counsel in plea bargaining and sentencing was well described in *People* v. *Moore*, *supra*, 57 Cal.App.3d 437, 129 Cal.Rptr. 279 (1976). Like the petitioner in this case, the state contended that Moore, who had obeyed the officers in not informing his counsel about his activities, was not "prejudiced." The defendant argued he had been deprived of counsel in plea bargaining, to which the state replied that there had been no plea bargaining with which counsel could have assisted. The state court of appeal's response is highly pertinent here:

> ". . . The argument is vacuous. The absence of a plea, and the meager benefits Moore received from his unaided bargaining, underscore the prejudicial effect of acting without counsel during crucial pretrial negotiations. It is idle to speculate whether Moore's counsel could have worked out a better deal with the distict attorney. The point is, Moore was entitled to have him try. Lack of effective counsel at a critical stage of proceedings renders them constitutionally defective. (*Anderson* v. *State of North Carolina*, 221 F.Supp. 930, 934-935.) (57 Cal.App.3d at 442.)

The *Moore* opinion is also instructive with regard to petitioner's attempt to compare this case to those involving intrusions into the attorney-client relationship that produce adverse evidence (*e.g., Weatherford* v. *Bursey*, 429 U.S. 545 (1977); *Massiah* v. *United States*, 377 U.S. 201 (1964).) On this point, the *Moore* court stated, in language equally applicable here:

> "At oral argument the People likened their intrusion into Moore's relationship with his attorney to a violation of the rights announced in *Miranda* v. *Arizona*, 384 U.S. 436 [1966]. . . . They argue Moore's remedy is to exclude from his trial any evidence gained by their acts in that regard.
>
> "This is not a case where the People have merely failed to advise a defendant of his rights to counsel and have gained evidence from one who has not knowingly waived his right to counsel. What results from a violation of *Miranda* rights is tainted evidence, and the exclusionary rule is adequate to cope with the violation.
>
> "Here the People actively interfered with an attorney-client relationship established to defend Moore against the charges for which he had been jailed. Resort to a rule of evidence cannot reasonably remedy violations of Moore's right to counsel which go to the very conduct of his defense. It is not evidence which has been tainted, rather, it is Moore's right to due process." (57 Cal.App.3d at 442.)

Like Moore, respondent was entitled to the aid of her counsel in the conduct of plea bargaining with the DEA agents. Petitioner's suggested application of evidentiary rules, such as *Miranda, Weatherford,* and *Massiah*, is simply irrelevant and inappropriate here.

Commonwealth v. *Manning, supra,* 373 Mass. 438, 367 N.E.2d 635 (1977), involved less egregious miscon-

duct than the present case, but the following thoughtful appraisal of the issue by the Supreme Judicial Court of Massachusetts well explains the need for the drastic remedy of dismissal:

> "Prophylactic considerations assume paramount importance in fashioning a remedy for deliberate and intentional violations of constitutional rights. Such deliberate undermining of constitutional rights must not be countenanced. The specific misconduct present in this case is particularly troublesome because only when the importunings of government agents are unsuccessful will the matter come to the attention of the courts, and there is, in turn, a grave danger that the courts themselves may become the instrumentality through which government agents may effectuate threats to defendants regarding the consequences of asserting constitutional rights. [¶] It may be that the only way to prevent such offensive and deliberate manipulation of criminal defendants is to formulate a per se rule which would mandate the dismissal of an indictment in cases in which government agents intentionally attempt to subvert the attorney-client relationship and the defendant's right to a fair trial. In the case now before us, we find it unnecessary to adopt such a rule. The indictment itself is so inextricably interwoven with the misconduct which preceded it that the only appropriate remedy here is to dismiss the indictment. (367 N.E.2d at 639.)

These views apply with even greater force to the facts of this case. The "prophylactic" rule of dismissal is necessary and appropriate to protect not only the accused, but the very integrity of the judicial system itself.

As indicated by the Appendix to petitioner's brief, referring to *United States* v. *Glover*, 596 F.2d 857 (9 Cir.), cert. denied 444 U.S. 860 (1979), the incidence of

such cases appears to be growing.[3] The government's concern about controlling such misconduct is commendable, but requiring approval of the United States Attorney as indicated in *People* v. *Moore, supra*, (where the district attorney's office itself was involved in the misconduct) provides no assurance whatever that abuses will be avoided.[4]

In order to protect the very integrity of the courts, as well as the constitutional rights of the accused, dismissal in such cases is necessary.

CONCLUSION

For these reasons, we respectfully request that the judgment of the Third Circuit be affirmed.

Respectfully submitted,

NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

By _____

SHELDON PORTMAN
Public Defender
Santa Clara County
California

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[3] Additional recent cases involving similar misconduct are: *Mitchell* v. *Superior Court, supra*, _____ F.2d _____ (9 Cir., No. 79-2502, 10/7/80) (now pending on petition for rehearing); *United States* v. *Pascal*, _____ F.Supp. _____ (N.D.Ill., No. 79 CR 98-2, 6/27/79).

[4] Similarly, in *Mitchell* v. *Superior Court, supra*, the state officers continued to act improperly *with* the approval of a deputy district attorney.